In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1321

FORRESTER A. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case concerns the proper income tax treatment of bad debt losses incurred by petitioner in connection with the financing of two corporations. The court of appeals rejected petitioner's contention that he was entitled to business bad debt deductions with respect to these losses and held that the district court had erred in denying the government's motions for a directed verdict and for judgment notwithstanding the verdict on the ground that petitioner was entitled

only to nonbusiness bad debt deductions. This decision is in accord with the decided cases, and there is no reason for further review.

This Court has held that a taxpayer seeking a business bad debt deduction must demonstrate that the loss in question arose from activities producing a return to him other than that of an investor, rather than from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business. *Whipple* v. *Commissioner*, 373 U.S. 193, 202. See also *Bodzy* v. *Commissioner*, 321 F. 2d 331 (C.A. 5); *United States* v. *Byck*, 325 F. 2d 551 (C.A. 5). In the instant case there is no evidence whatever that petitioner's activities from which the bad debt losses resulted were other than those of an investor. It is undisputed (Pet. 10) that petitioner was not developing these corporations for sale to customers in the ordinary course. Like any other investor petitioner's only possible return was enhancement in the value of, and the receipt of dividends with respect to, his stock.[1] Since the evidence showed that the losses in question were no more than losses by an investor, resulting from transactions entered into by him to bring profit to the corporations, and thereby to their shareholders, the district court erred in denying the government's motions for a

[1] According to petitioner's own testimony (R. 80), the Endure Paint Corporation stock that he was to receive had no value. Similarly, petitioner's only possible return from Electronic Detection Products Company was as an investor through enhancement in value of stock options that he held in the corporation.

directed verdict, and for judgment notwithstanding the verdict. See *United States* v. *Byck, supra.* The decision below is wholly in keeping with, and is required by, *Whipple* v. *Commissioner, supra,* where this Court held (p. 203) that since:

> there was no intention here of developing the corporations as going businesses for sale to customers in the ordinary course, the case before us inexorably rests upon the claim that one who actively engages in serving his own corporations for the purpose of creating future income through those enterprises is in a trade or business. That argument is untenable * * *, and we reject it. Absent substantial additional evidence, furnishing management and other services to corporations for a reward not different from that flowing to an investor in those corporations is not a trade or business under [the predecessor to the provision here in question].

There is no conflict between the decision below and that of the Second Circuit in *Weddle* v. *Commissioner,* 325 F. 2d 849. In that case the question was whether the taxpayer's bad debt loss arose from her trade or business of serving as the president and general manager of the corporation or from her activities as controlling shareholder of the corporation. The Tax Court held that the taxpayer had failed to sustain her burden of showing that protection of her trade or business of employment with the corporation had been a significant motivation for her guarantees of the corporation's obligations, *i.e.*, it ruled that in making the guarantees the taxpayer had acted as an investor. On appeal the Second Circuit affirmed. In the instant

case there is no evidence whatsoever that petitioner's relation to the corporations was anything but that of an investor when he made the advances and guaranteed the loans that resulted in the losses that are in issue. *Weedle* thus supports rather than conflicts with the decision in the present case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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